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Nos. 94-631, 94-797, 94-929

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ZELL MILLER, *et al.*,
*Appellants,*

and

LUCIOUS ABRAMS, JR., *et al.*,
*Appellants,*

and

UNITED STATES OF AMERICA,
*Appellant,*

v.

DAVIDA JOHNSON, *et al.*
*Appellees.*

On Appeal from the United States District Court
for the Southern District of Georgia

# BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVE GARY A. FRANKS, AND THE EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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Date: March 27, 1995

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## QUESTIONS PRESENTED

*Amici* will address the following questions:

I. Whether Appellees have sufficiently demonstrated standing to challenge Georgia's congressional redistricting plan by introducing evidence that they are Georgia voters and that the plan cannot be understood as anything other than an effort to classify and separate voters by race.

II. Whether "strict scrutiny" judicial review should be applied to a congressional district which was drawn so as to classify and separate voters by race and which is unexplainable in nonracial terms, regardless of the shape of the district.

III. Whether Appellants have demonstrated that in drawing the 11th Congressional District along racial lines, Georgia was serving a compelling state interest in a narrowly tailored manner.

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## INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide, including many in Georgia. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the ideal of a color-blind society in which the

civil rights of all Americans are equally respected. To that end, WLF has appeared before this Court as well as other state and federal courts in cases raising important civil rights issues. *See, e.g., Adarand Constructors, Inc. v. Pena,* No. 93-1841, *cert. granted*, 115 S. Ct. 41 (1994); *Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Chisom v. Roemer*, 111 S. Ct. 2354 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

Congressman Gary A. Franks is serving his third term in the U.S. House of Representatives, representing Connecticut's 5th Congressional District. Rep. Franks is of African-American heritage; the overwhelming majority of voters in his district are white. Rep. Franks testified at the trial of this matter in support of Appellees.

The Equal Opportunity Foundation (EOF) is a non-profit educational organization founded in 1987 dedicated to establishing in America a colorblind government in a colorblind society, and, to that end, to protecting the civil rights of all Americans. EOF has appeared before this Court as *amicus curiae* on a number of occasions, including in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

*Amici* believe that the people of Georgia were ill-served by the congressional districting scheme being challenged in this case. Racial gerrymandering -- by placing the state's stamp of approval on the notion that people of different races are inherently different from one another -- is a giant step backward from our goal of a color-blind society. Nothing in the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.*, requires such gerrymandering. Moreover, the experience of Rep. Franks and others demonstrates that blacks are fully capable of winning elections in districts that have not been gerrymandered to ensure African-American electoral majorities.

*Amici* believe that their experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this case. *Amici* submit this brief on behalf of Appellees with the written consent of all parties. The written consents are on file with the Clerk of the Court.

## STATEMENT OF FACTS

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Appellees' brief.

In brief, Appellees are residents of Georgia's Eleventh Congressional district who object to the congressional districting plan adopted by the Georgia legislature in March 1992. The plan was expressly designed so that a significant majority of voters in three of the state's eleven congressional districts (the Second, the Fifth, and the Eleventh) are African Americans (hereinafter referred to as "majority-minority" districts). *See* Appendix to Miller Jurisdictional Statement ("J.S. App.") 22 n.12.

Some sort of redistricting scheme had been made necessary by Georgia's substantial population growth during the 1980's, as measured by the 1990 Decennial Census. The growth entitled Georgia to an eleventh seat in the U.S. House of Representatives, whereas it previously had had only ten seats.

The Georgia state legislature initially adopted a redistricting plan in late 1991, which created two majority-minority districts; only one of the state's ten districts during the 1980's had been majority-minority. J.S. App. 12-14. Because Georgia is subject to the special provisions of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c,[1] the

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[1] Section 5 provides that any state with a history of abnormally low voter registration (as defined in 42 U.S.C. § 1973b(b)) must, (continued...)

state submitted this plan to the U.S. Attorney General for pre-clearance.

The Attorney General interposed a timely objection to the plan by letter dated January 21, 1992 (signed by Assistant Attorney General for Civil Rights John Dunne). J.S. App. 14. The letter expressed a "'concern' that the Georgia legislative leadership had decided to 'limit' black voting potential to two majority-minority districts." *Id.* The letter also stated that legislative leaders "did not make a good faith attempt to recognize the concentrations of black voters in the southwest" portions of Georgia by placing them in a majority-minority district. J.A. 105-106. Mr. Dunne refused to preclear the plan based on those findings, apparently concluding that the plan had "the purpose . . . of denying or abridging the right to vote on account of race."

The state legislature then adopted a second districting plan that attempted to respond to some of the concerns raised in Mr. Dunne's January 21, 1992 letter. However, the second districting plan again provided for only two majority-minority districts. J.S. App. 16-17.[2] On March 20, 1992, the Attorney General objected to this second plan as well. The letter interposing the objection stated that "no legitimate reason has been suggested to explain

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[1] (...continued)
before conducting elections that conform with a new districting scheme, obtain a declaratory judgment from the United States District Court for the District of Columbia that the redistricting scheme "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Section 5 further provides that the state need not obtain such a declaratory judgment if the districting scheme has been submitted to the U.S. Attorney General and the Attorney General has not objected thereto within 60 days.

[2] The Georgia Senate passed a bill calling for three majority-minority districts, while the House-passed bill called for two such districts. The Senate eventually acceded to the House-passed version. *Id.*

the exclusion" of large concentrations of black voters from majority-minority districts. J.A. 124. The district court later found (and no party disputes) that the Attorney general knew full well that the only way to include those black voters in majority-minority districts was to draw three such district, along the lines being pressed by black Georgia state legislators. J.S. App. 18. The letter stated that the explanation provided by the state for failing to do so (a reluctance to split counties when drawing up districts) "appears pretextual." *Id.*

Bowing to the Attorney General's clearly expressed preference for a plan creating three majority-minority districts, the Georgia legislature adopted such a plan in March 1992. On April 1, 1992, Georgia submitted this third plan to the Attorney General, and the Attorney General pre-cleared the plan the next day.

Appellees filed suit in January 1994 in the United State District Court for the Southern District of Georgia, alleging that the Eleventh District segregated voters on the basis of race, in violation of their rights under the Equal Protection Clause.[3] Appellees argued that the Eleventh District was shaped in a bizarre fashion that could only be explained as an effort to create a majority-minority district. The district consists of several widely-separated concentrations of black urban voters (in DeKalb County just outside Atlanta, in the Savannah area, and in the Augusta area), but generally excluding the white populations of those same urban areas. The urban portions of the Eleventh

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[3] In their briefs, Appellants repeatedly refer to Appellees as "whites" (*see, e.g.*, Brief for the United States at 7) -- even though Appellants are no doubt aware that Appellees' racial status plays no part in their cause of action. We can find no other explanation for these references other than an intentional effort to mischaracterize this case as one pitting the rights of whites against the rights of blacks. We find it particularly disturbing that the United States government would demean itself in this fashion. The appearance of Rep. Franks in this case as an *amicus curiae* in support of Appellees should put to rest any notion that only whites are disturbed by the intentional classification and separation of voters by race.

District -- which supply it with most of its population -- are connected by thousands of square miles of rural, agricultural lands in east-central Georgia.

Following a trial in July 1994, a three-judge court struck down the Georgia districting plan with respect to lines drawn between the Eleventh District and adjacent congressional districts. J.S. Supp. 1-106. The court held that the plan was subject to "strict scrutiny" because an effort to segregate voters by race was the "overriding" consideration that went into drawing up the Eleventh District. *Id.* at 42-52. The court then held that the plan could not survive "strict scrutiny" because it was not "narrowly tailored" to accomplishing any compelling state interest. *Id.* at 54-89. The court held that while compliance with §§ 2 and 5 of the Voting Rights Act constituted a compelling state interest, the Eleventh District could not be justified on that basis because it was not "narrowly tailored" to that purpose -- because neither § 2 nor § 5 required creation of a majority-minority Eleventh District under the facts of this case. *Id.* at 67-87.

On September 23, 1994, this Court stayed the relief granted by the district court. On January 6, 1995, this Court noted probable jurisdiction over each of the three appeals filed from the district court's judgment.

## SUMMARY OF ARGUMENT

Appellees have demonstrated standing to bring this action. Under the Court's *Shaw v. Reno* decision, plaintiffs in racial gerrymandering lawsuits are not required to present evidence that the effects feared by the *Shaw* majority have actually come to pass.

The district court applied the proper standard in determining whether "strict scrutiny" judicial review should be applied in a case challenging congressional reapportionment legislation. The district court properly held that strict scrutiny applies when the plaintiff demonstrates that "race was the overriding predominant

force determining the lines of the district." The district court also correctly determined that Appellees met that reasonably exacting standard.

Finally, Georgia failed to demonstrate that its adoption of legislation creating the Eleventh District was a narrowly tailored response to any compelling interest of the state. The district court properly declined to apply a "strong basis in evidence" standard, which would make it far too easy for states to justify racial classifications. The district court's finding -- that there was no evidence that Georgia's initial decision to create only two majority-minority districts instead of three was based on a racially discriminatory intent -- was not clearly erroneous.

## ARGUMENT

### I. APPELLEES HAVE STANDING TO PURSUE THEIR EQUAL PROTECTION CLAIM

Given the Court's ruling in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), Appellees' standing to argue that Georgia violated their rights under the Equal Protection Clause by segregating voters by race is not open to serious challenge. Nonetheless, because the Abrams Appellants and several of their supporting *amici* have raised the standing issue, we address the issue briefly.

Citing *Allen v. Wright*, 468 U.S. 737 (1984), the Abrams Appellants contend that Appellees failed to demonstrate the requisite "injury in fact" necessary to establish standing. Brief of Abrams Appellants at 49.

However, the Abrams Appellants fail to cite the discussion of standing in *Shaw*, a racial gerrymandering case in which the plaintiffs' "injury in fact" allegations were identical to Appellees'. *Shaw* explained:

> "[R]eapportionment legislation that cannot be understood as anything other than an effort to classify and

> separate voters by race injures voters in . . . ways [other than by diluting a racial group's voting strength]. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole. . . [The dissent] does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.

*Shaw*, 113 S. Ct. at 2828.

Various of Appellants' *amici* argue that Appellees lack standing because they failed to introduce specific evidence that racially segregated congressional districts were having the precise effects that *Shaw* feared would result. *See, e.g.*, Brief of *Amici* State of Texas, *et al.*, at 5-11. Such arguments miss the mark. *Shaw* explicitly held that racially segregated congressional districts "injures" voters such within those districts by *threatening* to undermine our system of representative democracy and by *signaling* to elected officials that they represent a particular racial group rather than their constituency as a whole. *Shaw*, 113 S. Ct. at 2828. Thus, *Shaw* makes clear that the constitutional injury is sufficiently demonstrated by evidence that voters have been classified and separated by race -- regardless whether the "threat" to representative democracy comes to pass or whether elected officials catch the "signal" they have been sent regarding who they are suppose to be representing.

The contrary argument espoused by Appellants' *amici* -- that those challenging a racial gerrymander must introduce evidence that the gerrymander is actually having the effects outlined in *Shaw* -- would place an unwarranted burden on those raising such challenges. Challengers would be required, before filing suit, to wait for years after the racial gerrymander has been put into place in order to gather evidence regarding how voters and elected officials act in response to the gerrymander. The Court quite clearly did not contemplate such delays when it

officials act in response to the gerrymander. The Court quite clearly did not contemplate such delays when it recognized a racial gerrymandering cause of action in *Shaw*.

Nor are Appellants and their supporting *amici* correct in asserting that *Shaw* represented a dramatic departure from the Court's established case law on standing. In a variety of contexts, the Court has indicated that standing to assert individuals' civil rights extends to the right to an environment free from state-mandated racial discrimination, without regard to whether the individual has suffered any other injury. Thus, the Court has allowed housing discrimination "testers" who were never actually denied housing on the basis of race (because they never intended to rent the apartment they applied for) to sue for violations of the Fair Housing Act of 1968, 42 U.S.C. § 3604, because any housing discrimination on the basis of race "deprived them of the benefits that result from living in an integrated community." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982). Similarly, criminal defendants (*Powers v. Ohio*, 111 S. Ct. 1364 (1991)), civil litigants (*Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991)), and even criminal prosecutors (*Georgia v. McCollum*, 112 S. Ct. 2348 (1992)) are entitled under the Constitution to insist that courtroom adversaries not exercise peremptory challenges to strike jurors on the basis of race (without an individualized showing by those raising the claim that they have been injured by the strike), because allowing any state-sanctioned racial discrimination to infect the trial system calls into question the essential fairness of that system.

As the district court recognized, Appellees "occupy a position virtually identical to those challenging North Carolina's congressional districting plan in *Shaw v. Reno*, and in that case standing was not in doubt." J.S. App. 33. Accordingly, Appellees' standing is not open to serious challenge.

## II. STRICT SCRUTINY IS WARRANTED WHENEVER RACE WAS THE OVERRIDING PREDOMINANT FORCE DETERMINING THE LINES OF A CONGRESSIONAL DISTRICT

A long line of decisions from this Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989) (plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw*, 113 S. Ct. at 2824 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The Court has also been mindful of the potentially harmful effects of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw*, 113 S. Ct. at 2832.

Racial classifications are no less suspect simply because they are employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, 488 U.S. at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-299 (1978)(Powell, J.). *Shaw* put to rest any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination:

> [The dissent] argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S. at

> 494 (plurality opinion); see also *id.* at 520 (Scalia, concurring in judgment). Accord, *Wygant [v. Jackson Board of Education]*, 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

*Shaw*, 113 S. Ct. at 829.

### A. A Bizarrely-Shaped District Is Not a Necessary Pre-Condition to a Racial Gerrymandering Claim Under Shaw

Despite *Shaw*'s strongly-worded disapproval of all forms of racial classifications, Appellants argue that the holding in *Shaw* was actually quite limited. They assert that *Shaw* is only applicable when the racial classification and separation of voters by race can be demonstrated by reference to objectively observable features of the voting district under challenge (*e.g.*, a bizarre shape). *See, e.g.*, Brief of Miller Appellants at 38-39; Brief of U.S. at 16-17. Although Appellants readily admit that race played a "large" role in the manner in which the Georgia legislature drew the Eleventh District's lines (Brief of Miller Appellants at 8), they argue that *Shaw* did not contemplate that racial gerrymandering claims could be demonstrated by reference to direct evidence of legislative intent.

*Shaw* cannot fairly be read in such a limited manner. Rather, *Shaw* held as follows:

> [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

*Shaw*, 113 S. Ct. at 2828. Nothing in that holding suggests that a court may base a decision that a voting district

"rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race" only upon the district's bizarre shape. To the contrary, *Shaw*'s reference to "an *effort* to separate voters" (emphasis added) indicates that the touchstone is legislative intent. While a voting district's bizarre shape may be strong evidence that the legislature intended the separation of races, nothing in *Shaw* suggests that a bizarrely-shaped district is a necessary ingredient of a racial gerrymandering claim. When, as here, Appellants readily admit the predominant role played by race in the structuring of the Eleventh District, there is little need for courts to resort to indirect methods of determining legislative intent, such as examining the district's shape.

The United States makes a half-hearted effort to assert that bizarrely-shaped racially gerrymandered districts are somehow worse than districts that are not bizarrely shaped but that nonetheless cannot be understood as anything other than an effort to separate voters into different districts on the basis of race. The United States asserts that the negative effects of a racial gerrymander identified by *Shaw*:

> [M]ay flow from a district whose extraordinary appearance advertises that the legislature was according special treatment to members of a minority group that it would not give to others similarly situated.

Brief of United States at 20. But surely those same injuries would flow from any district -- regardless whether it was bizarrely shaped -- that cannot be understood as anything other than an effort to separate voters into different districts on the basis of race. So long as there is a general "underst[anding]" that the legislature was acting for no other purpose but to separate voters by race, the reaction of voters and elected officials will be the same regardless of the district's shape.

The United States also argues -- in support of its limiting construction of *Shaw* -- that courts should be

extremely reluctant to examine legislative intent in the absence of objectively observable evidence of intent (*i.e.*, a bizarrely shaped district) because of the difficulty in ascertaining a legislature's "overriding" or "predominant" motive. Brief of United States at 21-22. That argument is disingenuous coming from the federal government, which regularly engages in exhaustive examination of legislative intent in connection with its pre-clearance authority under § 5 of the Voting Rights Act. Indeed, the Attorney General refused pre-clearance to each of the Georgia legislature's first two post-1990 congressional districting plans because he found that those plans had been adopted with the *intent* of abridging minority voting rights. The United States makes no attempt to explain why a close examination of legislative intent is proper when the issue is compliance with § 5 but not when the issue is compliance with the Equal Protection Clause.[4]

In sum, *Shaw* is applicable to any electoral district that rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race -- regardless whether the district's shape could properly be termed "bizarre." Clearly, a bizarre shape is some evidence of the legislature's intent, but it is neither a necessary nor a sufficient condition for a *Shaw*

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[4] In support of its argument, the United States cites *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), for the proposition that "the Court has rejected judicial inquiry into whether 'a particular purpose,' out of many that may have motivated a 'legislative or administrative' body operating under a broad mandate' to make a decision, 'was the "dominant" or "primary" one.'" Brief of United States at 21. That misleadingly truncated quotation from *Arlington Heights* turns the decision in that case on its head. *Arlington Heights* stated that the normal judicial reluctance to examine legislative intent goes out the window when a plaintiff alleges that a legislature was motivated by racially discriminatory intent. Immediately after the language cited by the United States, the Court stated: "But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265.

claim. What constitutes a "bizarre" district is obviously in the eye of the beholder: we view the Eleventh District as bizarrely shaped, while Appellants do not; and there is no objective method of measure bizarreness. In light of that basic definitional problem, there is little sense in making the existence of a *Shaw* claim turn on characterizations of the district's shape.

### B. The District Court's Standard Will Not Subject Every Redistricting Effort to Exacting Judicial Review

Appellants argue that the standard of review applied by the district court is overly harsh and will subject every legislative redistricting effort to a "strict scrutiny" standard of review. The Miller Appellants argue, for example, that race is "invariably" a factor in redistricting cases (Brief at 6-8), and that the district court's holding that any redistricting decisions based on race are subject to strict scrutiny "arrogate[s] to the courts the classic role of 'super-legislature' that our Constitution forbids." Miller Brief at 38.

Appellants' arguments are based on a misreading of the district court's quite limited decision in this case. The district court did not hold that strict judicial scrutiny is warranted whenever race is *a* motivating factor is district line drawing. Rather, the court reserved strict scrutiny for those cases in which:

> [T]he legislature (a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding predominant force* determining the lines of the district. If race, however deliberately used, was one factor among *many of equal or greater significance* to the drafters, the plan is not a racial gerrymander/racial classification subject to strict scrutiny.

J.S. App. at 36 (emphasis in original).

This moderate approach to judicial review takes into account the common-sense distinction that the Court has regularly drawn between conduct with a discriminatory purpose and conduct taken "in spite of" its consequences:

> 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effect upon an identifiable group.

*City of Mobile v. Bolden*, 446 U.S. 55, 71 n.17 (1980) (quoting *Personnel Manager of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). In other words, states need not worry that their districting plans will be struck down as constituting an unconstitutional racial gerrymander merely because drafters were aware of the effect that the plan would have on various racial groups.

Nor would the district court's standard require strict scrutiny review whenever a legislature intended to construct a majority-minority district. The district court recognized that so long as such a district also can "rationally . . . be understood" as being intended to serve nonracial goals (*Shaw*, 113 S. Ct. at 2828), then strict scrutiny is unwarranted. Thus, for example, Georgia's Fifth Congressional District (which encompasses much of Atlanta's black population) clearly would not be subject to strict scrutiny under the district court's standard, even though the Georgia legislature intended to draw the Fifth District as a majority-minority district and even though it would be quite easy to draw districts in the Atlanta area such that none would be majority-minority. Strict scrutiny would be inapplicable, because the Fifth District can rationally be understood as serving two nonracial goals of the Georgia legislature: the district is reasonably compact, and it was drawn up in a manner designed to enhance the incumbent's ability to be re-elected.

It is equally obvious that the district court was correct in determining that the Eleventh District should be subjected to strict scrutiny under the district court's standard. The history leading up to adoption of the Eleventh District -- particularly Georgia's unwillingness to draw such a district until virtually ordered to do so by the U.S. Department of Justice -- makes clear that, absent racial considerations, Georgia would never have drawn a district even remotely resembling the Eleventh District but for the purpose of creating a majority-minority district. Georgia had never before attempted to draw a district linking black sections of DeKalb County to distant urban areas surrounding Augusta and Savannah. Moreover, when Georgia decided in March 1992 to do so for the first time, it chose to link those sections of DeKalb County not with the entire cities of Augusta and Savannah, but rather with only the black sections of those cities. Those two decisions were crucial to the legislature's ability to draw three majority-minority districts, and Appellants have put forward no nonracial explanation for these crucial components of the Eleventh District.

In arguing that nonracial considerations went into the drawing up of the Eleventh District's lines, Appellants point to efforts by state election officials to avoid splitting many of the rural counties contained in the Eleventh District, and to the fact that the district's line "is predominantly located on geographical and political markers that have local significance wholly independent of race." Brief of Miller Appellants at 45. Appellants are correct that Eleventh District is more "regular" in shape than the district originally proposed by the ACLU and other early champions of three majority-minority districts. But no amount of smoothing out of "bumps" in the Eleventh District can obscure that: (1) two highly irregular features of the district -- the linking of DeKalb County with distant urban areas with which it had never previously been linked and the decision to include only black neighborhoods in the linkage -- were undeniably included for the purpose of creating a majority-minority district; (2) three majority-minority districts could not have

been drawn unless those two feature were included in the Eleventh District; (3) Georgia knew that it would not receive pre-clearance from the Justice Department until it submitted a congressional redistricting plan that included three majority-minority districts. In light of that evidence, the district court correctly concluded that race was the "overriding predominant force determining the lines" of the Eleventh District.

Nor can Georgia escape strict scrutiny by arguing that its nonracial motive was a desire to obtain pre-approval from the Justice Department. When a governmental body bows to pressure to act in a certain manner and is aware that the party pressuring it to act is doing so for racially discriminatory reasons, the federal courts have never permitted the governmental body to escape scrutiny under the Equal Protection by arguing that it did not share in the discriminatory motive. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987)("A governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens."); *United States v. City of Birmingham*, 538 F. Supp. 819, 828 (E.D. Mich 1982)(same), *affirmed as modified*, 727 F.2d 560 (6th Cir. 1984), *cert. denied*, 469 U.S. 821 (1985).

In sum, the district court's standard for determining whether strict judicial scrutiny should be applied to the Eleventh District is faithful to this Court's admonition in *Shaw* that the Equal Protection Clause forbids districting legislation which, "although race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw*, 113 S. Ct. at 2828. Moreover, the district court's finding that application of strict scrutiny is appropriate in this case is fully consistent with the court's factual findings.

## III. THE ELEVENTH CONGRESSIONAL DISTRICT CANNOT WITHSTAND STRICT SCRUTINY

*Shaw* held that once districting legislation is found to be "unexplainable on grounds other than race," it is subject to "the same close scrutiny" that the Court has given to "other state laws that classify citizens by race." *Shaw*, 113 S. Ct. 2825. Under those circumstances, the legislation is unconstitutional unless the state can demonstrate that its legislation "is narrowly tailored to further a compelling governmental interest." *Id.* at 2832.

Georgia contends that it has a compelling interest in complying with the Voting Rights Act and that it adopted its redistricting scheme in order to further that compelling interest. While recognizing that compliance with the Voting Rights Act (to the extent that it is constitutional as applied) constitutes a "compelling" state interest, the district court held that the Eleventh District could not pass constitutional muster because it is not "narrowly tailored" to achieving the goal of Voting Rights Act compliance. J.S. App. 59-89. That conclusion is fully supported by the evidence before the district court and relevant case law.

### A. The District Court Properly Declined to Apply the "Strong Basis in Evidence" Standard

The United States argues that -- even assuming the applicability of strict scrutiny to this case -- the district court used an improper strict scrutiny standard. Brief for U.S. at 28. The district court held that in order to invoke the Voting Rights Act as justification for its action, Georgia was required to show that the Act mandated the drawing of three majority-minority districts. The United States argues that a lesser showing is required:

> [I]t need only be shown that there was a "strong basis in evidence" for the State's actions -- a standard that is satisfied if there was a sound basis for believing that the State's failure to draw a third majority-minority

> district would have led to a prima facie case against it under either Section 2 or 5 of the Voting Rights Act.

*Id.* at 28-29.

The United States's efforts to import the "strong basis in evidence" standard into this case is wholly misplaced. None of the case law cited by the United States (including *Croson* and *Wygant*) supports application of that standard in this case.

In contrast to this case (in which Georgia claims a compelling interest in prospective compliance with the Voting Rights Act), *Croson* and *Wygant* involved state actors attempting to defend race-based classifications by claiming a "compelling interest" in overcoming the present effects of past race discrimination. *Croson* held that such classifications could be upheld only upon a showing of a "strong basis in evidence" that there existed present effects of past discrimination by the state actor (*Croson*, 488 U.S. at 500) and that the race-based classification was "narrowly tailored" to eliminating such present effects. *Id.* at 507. The considerations that led the Court to adopt the "strong basis in evidence" standard in *Croson* and *Wygant* are inapplicable to this case.

The rationale behind the "strong basis in evidence" standard (a standard which places on defendants an evidentiary burden that is somewhat less than a "preponderance of the evidence" standard) was best explained in Justice O'Connor's concurring opinion in *Wygant*. She explained that to hold a state actor, whose "remedial" racial preference program has been challenged, to a "preponderance of the evidence" standard might discourage states from attempting to eliminate the continuing effects of past unconstitutional racial discrimination -- because any state making such a showing might expose itself to claims from victims of that past discrimination. *Wygant* at 291-92 (O'Connor, J., concurring in part and concurring in the judgment). Thus, a modicum of deference is granted to a state actor's evidence of continuing effects of past discrim-

ination, in order to encourage voluntary race-based remedies where there is strong evidence that such remedies are needed.

That rationale is of no relevance here, where Georgia does not claim to be attempting to overcome any continuing effects of past discrimination.[5] Rather, Georgia argues that its new congressional districting scheme is justified by a compelling interest in ensuring that now and in the future it will be in compliance with the Voting Rights Act. Requiring Georgia to come forward with evidence to support its claim that it had no choice under the Voting Rights Act but to draw district lines as it did will not expose Georgia to new liability claims, since past racial discrimination by Georgia is irrelevant to whether the *new* district lines comply with the Voting Rights Act.

More importantly, the district court did not base its decision on a finding that Georgia had failed to demonstrate a compelling interest in compliance with the Voting Rights Act. Rather, the court held that the Eleventh District was not narrowly tailored to achieving that compelling interest. *Croson* and *Wygant* did not apply the "strong basis in evidence" standard to the narrowly tailored test -- because requiring a state actor to introduce evidence that its remedial program is narrowly tailored does not expose the state actor to new liability. Rather, *Croson* required state actors to meet their evidentiary burden on

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[5] We note that other Appellants and supporting *amici do* argue that the Georgia districting scheme can be justified as an attempt to overcome the continuing effects of past racial discrimination. But the only "continuing effect" they cite is racially polarized voting, and there is no evidence in the record to support the counter-intuitive notion that classifying and segregating voters by race will reduce racially polarized voting. Moreover, there is little evidence to suggest that the moderate degree of racially polarized voting found by the district court to exist in Georgia is attributable to the severe discrimination historically inflicted on black voters in Georgia; racially polarized voting appears to be no more extreme in Georgia than in states without its history of voting discrimination.

the "narrowly tailored" issue by a preponderance of the evidence. *Croson*, 488 U.S. at 507.

In sum, the district court properly held that, in order for Georgia's districting scheme to survive strict scrutiny, Georgia would have to demonstrate by a preponderance of the evidence that its districting scheme was mandated by the Voting Rights Act.

### B. The Eleventh District Is Not Narrowly Tailored to Furthering a Compelling Interest in Complying with the Voting Rights Act

After conducting a trial in this matter, the district court determined that the Eleventh District was not narrowly tailored to furthering Georgia's compelling interest in complying with either § 2 or § 5 the Voting Rights Act. Factual findings made by the district court in connection with that determination are subject to review under the clearly erroneous standard. Appellants do not argue that any of the district court's factual findings were clearly erroneous -- including its finding that there was no evidence that Georgia's first districting plan was motivated by an intent to abridge minority voting rights. J.S. App. 13. The district court's factual findings compel a conclusion that the Eleventh District cannot survive strict scrutiny because it is not narrowly tailored to furthering any compelling interest of the state.

The district court's opinion sets forth in detail why neither § 2 nor § 5 of the Voting Rights Act compelled Georgia to draw three majority-minority districts. *Amici* find the opinion persuasive and thus will not repeat all of the district court's argument. We nonetheless wish to respond to a number of the points in this regard raised by Appellants and their supporting *amici*.

Despite the district court's finding that Georgia's initial districting plan (which called for the creation of two majority-minority districts rather than three) was not motivated by a intent to abridge minority voting rights, the

United States continues to insist that there was a strong evidentiary basis for concluding that failure to create three majority-minority districts would have violated § 5 of the Voting Rights Act. While admitting that the first plan would not have violated § 5's non-retrogression principle,[6] the United States argues that Georgia might still have been found in violation of § 5's prohibition against new districting schemes whose "purpose" was to abridge minority voting rights. Brief of U.S. at 29-30.

The "evidence" cited by the United States in support of that "purpose" argument is insubstantial. First, the United States argues that discriminatory purpose can be inferred based on Georgia's past history of discrimination against black voters. *Id.* at 32. But the none of the evidence of past discrimination is recent, and the United States makes no attempt to demonstrate why -- contrary to the Federal Rules of Evidence -- evidence of past bad acts tends to show that Georgia acted with discriminatory purpose on this occasion.

Second, the United States argues that Georgia's willingness to split counties (apparently for partisan, nonracial reasons) in creating the Fourth District is evidence that Georgia's unwillingness to do so for purposes of creating three majority-minority districts was pretextual. *Id.* We find this argument particularly ironic in light of the United States's current defense of the Eleventh District: that its borders can be explained in considerable part by the state's desire to keep political units intact to the extent possible when drawing district line. That defense is an acknowledgment that Georgia's aversion to splitting

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[6] The non-retrogression principle, as articulated in *Beer v. United States*, 425 U.S. 130 (1976), holds that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. Since the first Georgia districting plan would have increased the number of majority-minority districts from one to two, the first plan clearly did not violate the non-retrogression principle.

counties is a legitimate and sincerely held districting principle -- and undercuts any evidence that Georgia's unwillingness to split counties as part of its first districting plan was a pretext for racial discrimination.

Third, the United States argues that intent to discriminate can be inferred from mere knowledge that failure to create a third majority-minority district would lead to election of fewer black Members of Congress than if a third majority-minority district were created. *Id.* at 33. But, as noted above, this Court has always carefully distinguished between intent as awareness of consequences and intent as purposeful selection of a course of action "because of" the adverse effects of such action on an identifiable group -- with only the latter constituting purposeful discrimination. *City of Mobile*, 446 U.S. at 71 n.17. Accordingly, such knowledge on the part of Georgia legislators adds nothing to the United States's "intent" argument. *See also, New York v. United States*, ___ F. Supp. ___, 1994 WL 744179 (D.D.C. 1994)(rejecting United States's claim that evidence of knowledge of consequences can be equated with intent for purposes of § 5 preclearance).

In sum, there is no evidence to suggest that Georgia's first districting plan violated § 5 of the Voting Rights Act; accordingly, the district court's decision to that effect is certainly not clearly erroneous.

Some of the Appellants and their supporting *amici* complain that the district court -- in making that finding -- failed to accord proper deference to the Attorney General's January 1992 letter finding that the first districting plan did not comply with § 5. But the language of § 5 itself suggests that no deference is due;[7] and on

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[7] *See* 42 U.S.C. § 1973c ("Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin enforcement."). Moreover, the provision of § 1973c granting a (continued...)

numerous occasions court decisions have, over the objections of the Attorney General, entered declaratory judgment in favor of a covered jurisdiction to the effect that its redistricting plan complied with § 5 -- without giving any indication that the Attorney General's objections are entitled to deference. *See, e.g., Beer v. United States*, 425 U.S. 130 (1976).

Moreover, Appellees were not parties to the pre-clearance proceedings in front of the Attorney General and thus cannot be bound by any findings in those proceedings. Any effort to give special weight in these proceedings to administrative findings rendered in a proceeding to which Appellees were not parties runs afoul of the teachings of *Martin v. Wilks*, 490 U.S. 755 (1989)(city sued by white firefighters alleging racial discrimination in promotions may not defend by arguing that blacks were given preference pursuant to a federal-court consent decree, where white firefighters were not parties to the prior federal court action).

Finally, we take strong issue with those among Appellants and *amici* who argue that states have a compelling interest in drawing majority-minority districts because, in the absence of such districts, whites will not vote for blacks in sufficient numbers to permit election of blacks to public office. Racially polarized voting is a sad fact of life in this country -- but it is clearly on the decline, as witnessed by the recent elections of Gary Franks, J.C. Watts, and Alan Wheat to the U.S. House of Representatives; Carol Moseley-Braun to the U.S. Senate, and Douglas Wilder as Governor of Virginia. All are African Americans elected in jurisdictions in which the overwhelming majority of voters are white. Indeed, 83% of the black mayors elected in cities of 50,000 or more in

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[7] (...continued)
covered jurisdiction the option of bypassing the Attorney General altogether and going straight to court to obtain pre-clearance suggests that the Attorney General's findings in this area are not entitled to any special weight.

the past 30 years have not had the benefit of a majority-black constituency.[8] It would be tragic if the progress that this nation is making toward color-blind voting were reversed by state decisions to classify and separate voters by race.

## CONCLUSION

*Amici curiae* Washington Legal Foundation, Rep. Gary A. Franks, and the Equal Opportunity Foundation respectfully request that the Court affirm the decision of the lower court.

Respectfully submitted,

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[8] Sixty-one percent were elected in municipalities less than 40% black, and 43% took office in cities less than 30% black. Thernstrom and Thernstrom, "The Promise of Racial Equality," in *The New Promise of American Life* (Alexander and Finn eds. 1995).